U.S. and Texas Law on Independent Militias

Our duty as citizens

Most American citizens are aware that the U.S. Constitution guarantees certain rights and limits the powers of government. However, it also imposes certain duties, not only on organs of government, but on each citizen. One of these duties is to function as members of the Militia, and the state has the duty to organize and train citizens to so serve.

The U.S. Constitution provides for this in Article I, Section 8:

Congress shall have power ...

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

The Framers contemplated that the citizens who compose the Militia would provide their own weapons, which is reflected in the Second Amendment:

A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

It is important to understand that the prevailing practice at the time the Constitution was adopted was for people in each locality to organize as independent local militias and to train themselves. The only change the Framers sought to make was to make this organization and training more systematic, along the model of Switzerland. They never imagined that future governments might try to restrict the local organization and training of independent militias by contending that people had the right to assemble and the right to keep and bear arms, but not to combine the two rights. To them that would have seemed absurd.

U.S. legislation on the Militia

In 1792 President Washington tried to get Congress to fully implement the constitutional requirement for organizing and training the Militia, but Congress, wanting to avoid the expense imposed on the states, only agreed to pass a law that required every able-bodied [free] male to keep a "musket or firelock". This was the Militia Act of 1792. By failing to require organization and training, it laid the basis for the decline of the Militia tradition.

In 1903, the Militia Act of 1792 was superseded by the Dick Act, which established the National Guard system, and made a distinction between the "organized" and "unorganized" Militia, reflecting the attitude that the Powers that Be didn't want most of the people to get organized as independent militias, despite the support for universal military training from most U.S. Presidents up to the administration of Harry Truman.

The Dick Act is encoded in 10 USC:

United Stated Code (USC)
TITLE 10--ARMED FORCES

Section 311. Militia: composition and classes

(a) The militia of the United States consists
of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are commissioned officers of the National Guard.
(b) The classes of the militia are--
(1) the organized militia, which consists of the National Guard and the Naval Militia; and
(2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

Section 312. Militia duty: exemptions

(a) The following persons are exempt from militia duty:
(1) The Vice President.
(2) The judicial and executive officers of the United States, the several States and Territories, Puerto Rico, and the Canal Zone.
(3) Members of the armed forces, except members who are not on active duty.
(4) Customhouse clerks.
(5) Persons employed by the United States in the transmission of mail.
(6) Workers employed in armories, arsenals, and naval shipyards of the United States.
(7) Pilots on navigable waters.
(8) Mariners in the sea service of a citizen of, or a merchant in, the United States.
(b) A person who claims exemption because of religious belief is exempt from militia duty in a combatant capacity, if the conscientious holding of that belief is established under such regulations as the President may prescribe. However, such a person is not exempt from militia duty that the President determines to be noncombatant.

TITLE 32--NATIONAL GUARD

Section 313. Appointments and enlistments: age limitations

(a) To be eligible for original enlistment in the National Guard, a person must be at least 17 years of age and under 45, or under 64 years of age and a former member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps. To be eligible for reenlistment, a person must be under 64 years of age.
(b) To be eligible for appointment as an officer of the National Guard, a person must--

(1) be a citizen of the United States; and
(2) be at least 18 years of age and under 64.

It should be understood that these definitions apply only to the Militia that is subject to call-up by the federal government, and states may require other people to perform militia duty, with different age ranges and exemptions.

Texas law on the Militia

The Texas Constitution once had a strong provision regarding militias:

Article 16. Section 46.

The Legislature shall provide by law for organizing and disciplining the militia of the State, in such manner as they shall deem expedient, not incompatible with the Constitution and Laws of the United States.

This section was deleted. The effect of this is that such authority reverts back to local communities.

Present statutes are encoded in Texas Government Code Chapter 431:

Subchapter A. General Provisions

431.001. Definitions

In this chapter:

(1) "Reserve militia" means the persons liable to serve, but not serving, in the state military forces.

(2) "State militia" means the state military forces and the reserve militia.

(3) "State military forces" means the Texas National Guard, the Texas State Guard, and any other active militia or military force organized under state law.

(4) "Texas National Guard" means the Texas Army National Guard and the Texas Air National Guard.

431.010. Organization Prohibited

(a) Except as provided by Subsection (b), a body of persons other than the regularly organized state military forces or the troops of the United States may not associate as a military company or organization or parade in public with firearms in a municipality of the state.

(b) With the consent of the governor, students in an educational institution at which military science is a prescribed part of the course of instruction and soldiers honorably discharged from the service of the United States may drill and parade with firearms in public.

(c) This section does not prevent a parade by the active militia of another state as provided by law.

Subchapter D. Texas State Guard

431.051. Supplemental Militia

To provide militia strength for use by the state as a supplement to the Texas National Guard, the Texas State Guard exists as part of the state militia under the Second Amendment to the United States Constitution and a defense force under 32 U.S.C. Section 109.

Subchapter F. Service and Duties

431.081. Persons Subject to Military Duty; Persons Not Eligible to Enlist

(a) A person is subject to military duty if the person is:

(1) able-bodied;

(2) a citizen or a person of foreign birth who has declared an intent to become a citizen;

(3) a resident of the state;

(4) at least 18 and not more than 60 years of age; and

(5) not exempt under Subsection (b) or (c) or United States law.

(b) A person is exempt from military duty, except in case of war, insurrection, invasion, or imminent danger of war, insurrection, or invasion if the person is:

(1) the lieutenant governor;

(2) a member or officer of the legislature;

(3) a judge or clerk of a court of record;

(4) a head of a state agency;

(5) a sheriff, district attorney, county attorney, county tax assessor-collector, or county commissioner;

(6) a mayor, council member, alderman, or assessor and collector of a municipality;

(7) an officer or employee of the Texas Department of Corrections, a state hospital or special school, a public or private hospital, or a nursing home;

(8) a member of a regularly organized and paid fire or police department in a municipality, except that a person is not relieved of military duty by joining such a department;

(9) a minister of the gospel exclusively engaged in that calling; or

(10) a person who conscientiously scruples against bearing arms.

(c) A mentally disabled person, vagabond, confirmed alcoholic, narcotics addict, or a person convicted of an infamous crime is exempt from military duty regardless of circumstances.

Now, what about that Section 431.010 prohibiting military companies or organizations or parades within municipalities? It clearly expresses hostility to independent local militias within municipalities, but it has no penalties, and does not apply to rural areas. It's main intent seems to be to discourage local officials from calling up the militia.

The only statutes which local officials might invoke against a militia muster within a municipality would be those against exhibiting a firearm in a way that "alarms" the public. However, centuries of common law makes it clear that merely carrying firearms is not to be considered "alarming". The arms must actually be brandished toward someone in a threatening manner. This would not prevent arrests on this ground, of course, but successful prosecution is unlikely if the courts follow the law and the Constitution.

Some of these points are more fully discussed in 29 Tex. Jur., Sections 4 and 5, and in 12 Tex. Jur. 3d., Sections 12-28.

The only significant case law involving this statute is a federal case, Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan (D.C. 1982) 543 F.Supp. 198, in which the plaintiff invoked the state statute in a federal suit for injunction against the defendant. The injunction was granted, and the judge took advantage of the case to write an opinion on the interpretation of the state statute. However, that opinion has no *stare decisis* effect, because this was not an appeal, nor was the judgement appealed. The injunction was properly granted under common law against intimidation, but a federal judge had no real business interpreting state law. However, it is indicative of how that judge might decide the constitutional issues in other cases. The case does, however, underscore the importance of distinguishing between private associations and public militias, and of making sure that any constitutional militias that may be organized take care not to take on the attributes of a private group. Too many people, including authorities, have examples in mind like the KKK, and we must always make sure to distance ourselves from such partisan organizations, and, indeed, indicate that the suppression of such groups is one of the things that a real militia might be called up to do.

There is another statute that arguably involves the Militia, the Texas Disaster Act of 1975, which has among its purposes, "providing an emergency management system embodying all aspects of predisaster preparedness and postdisaster response. See 12 Tex. Jur. 3d. Sections 51-53. If fully implemented, the organization of local militia units seems to be required under this Act.

Conclusions

Present U.S. and Texas law clearly fail to implement the requirements for organizing and training the Militia established by the Framers. However, we must also recognize that this failure goes all the way back to 1792, and that such organizing and training are, therefore, left to the people themselves, in the form of independent local militias, which they have a constitutional duty to maintain in a high state of preparedness, even if they get little support from the authorities, and indeed, especially if they get opposition from the authorities.